

## Widow awarded \$2.5M against highway dept.

### Highway construction contractors settle for \$500K



Dean Nash



Brian Franciskato

By ANNE C. VITALE

In what appeared to be a routine traffic accident, a man blew through a stop sign in rural Boone County and was hit and killed by an oncoming motorist.

But since the intersection was under construction and the Missouri Highway and Transportation Commission had directed the removal of a flashing red light and the temporary installation of the stop sign, the widow's attorney successfully crafted a wrongful death lawsuit against MHTC and the construction contractors. She ultimately recovered a pre-cap total of \$3 million through settlements and arbitration.

Although discovery revealed MHTC to be the most culpable defendant, the plaintiffs figured a "home run" was impossible against the highway department because of the statutory damage cap. Therefore, the plaintiff's opted to pursue the case against the contractors first and the highway department second, since the potential recovery against the contractors was much greater, said plaintiff's attorney Brian S. Franciskato of Kansas City.

In this pre-tort reform lawsuit with the threat of joint and several liability, the plaintiff and contractors agreed to pre-trial settlements totaling \$505,000.

"While a large award was possible and could be recovered from the contractors, it was likely that [the decedent driver] would receive substantially more fault than the contractors," Franciskato said. "Therefore, under the old joint and several liability law applicable to the case, the maximum the contractors would have had to pay would have been double their share of the fault. We essentially settled with the contractors for the amount we believed the contractors would have paid on the most likely jury outcome under this scenario."

After settling with the contractors, the plaintiffs sought arbitration with MHTC pursuant to §226.095, which provides that upon the plaintiff's request a negligence action against the Missouri Department of Transportation "shall be" arbitrated by a three-arbiter panel.

"We believed it was highly likely that a three-arbiter panel would find that the highway department was partially at fault and the damage figure would be large enough that we would be awarded the damage cap," Franciskato said. "We believed the greater predictability of the arbitration process was to our advantage since a large jury award, even if achieved, would be limited to the damage cap."

The arbitrators awarded \$2.5 million in damages. But the award was capped at \$300,000 and adjusted to \$345,499 for inflation — for a net recovery of \$850,499.

"My hat's off to plaintiff's counsel," said Zachary Cartwright of Jefferson City, senior litigation counsel for the Missouri Department of Transportation. "They did an excellent job and certainly worked the system to the best advantage of their client. There was a reasonable probability that a Boone County jury would have returned a verdict in favor of all defendants."

The arbitration panel returned its award in *van Driel v. Chester Bross Construction Company, et al.*, on July 24.

#### Dangerous intersection

Robert van Driel, a native of the Netherlands, was an executive chef who had been living in Nebraska with his wife of 10 years, Virginie, and their 7-year-old son, Vincent. In November 2000, van Driel started a new job as vice president with Fresh Ideas, which provided food services to colleges and universities in central Missouri.

Van Driel, 43, was in negotiations with the owner to acquire an ownership interest in the Mexico, Mo.-based business. But since they didn't want Vincent to transfer schools until the end of the school year, Virginie and Vincent were still living in Nebraska.

On Nov. 20, after living in Missouri for just 20 days, van Driel was on his way back up to Nebraska to spend Thanksgiving weekend with his family. Getting an early start before sunrise, he took off in his 2000 Chevrolet Malibu at about 6 a.m. and was traveling westbound on Missouri Route 22 in Boone County.

With his headlights on and his seatbelt fastened, van Driel approached the isolated rural intersection with U.S. Highway 63. While cruising at the 60 mph speed limit, van

Driel failed to stop at a stop sign controlling westbound traffic at the T-shaped intersection. He drove directly into the path of Martha Davis, who had the right-of-way while driving her 1996 GMC Yukon southbound on Highway 63 at about the same speed.

The two vehicles violently collided in the southbound lanes of Highway 63. Although his airbags deployed upon impact, van Driel died instantly of massive head trauma.

For about six months before the fatal collision, the Missouri Highway and Transportation Commission and its contractors and subcontractors had been engaged in a highway improvement project at the intersection. The project would add lanes to Highway 63 and provide an overpass and interchange for traffic from Route 22 to merge onto southbound Highway 63 - eliminating the need to cross the northbound lanes.

Before the construction project began, a traffic light had hung over the intersection for about 30 years — flashing red for traffic on westbound Route 22 and yellow for traffic on Highway 63. But about four months before the collision, MHTC removed the flashing overhead beacon because construction required them to move dirt at a height that would interfere with the power line supplying electricity to the flashing light — which would become unnecessary once the improvements were completed. MHTC did not conduct a traffic study before removing the flashing light and substituting a temporary 36-inch stop sign.

In response to numerous complaints about dangerous near misses and potential accidents at the intersection, MHTC installed a sign indicating "intersection ahead" on westbound Route 22 approaching Highway 63. The sign had a small battery-powered blinking light on top, but there was conflicting testimony whether the blinking light was operative at the time of the collision.

After the accident, Franciskato noted, MHTC installed a larger, 48-inch stop sign, a "stop ahead" sign and "rumble strips" approaching the intersection. They also reduced the speed limit to 35 mph and installed a "reduced speed ahead" sign.

#### Improper traffic control

Virginie van Driel filed suit in September 2001, claiming that the accident was the result of improper highway construction and traffic control. In addition to MHTC, the original defendants included Chester Bross Construction Company, the general contractor, and Sverdrup Civil, Inc., the engineering firm — which they dismissed upon learning that MoDOT engineers had designed the traffic control plans.

Through the discovery process, Franciskato added subcontractors Hardy's Inc. — which built the dirt mounds and allegedly inspected the signs, and ATK Safety Supply, Inc. — which provided and installed the signs.

The plaintiffs made separate claims against each contractor and subcontractor. But the general theme pertained to the corporate defendants' lack of proper traffic control and failure to inspect the signs and construction area at night for visibility concerns, Franciskato said.

The defendants contended that van Driel was solely responsible for running the stop sign, he said. They also claimed that there was insufficient evidence to prove causation and that the plaintiffs were merely speculating as to what happened.

Each corporate defendant filed a motion for summary judgment claiming they were not responsible because they followed MoDOT's instructions. The court denied all three motions, and the plaintiffs zeroed in on MHTC as the most culpable defendant.

"This case presented an unusual situation for a construction zone accident case in that the highway department, not the general contractor or subcontractors, performed most of the actions on which we based the negligence claims," Franciskato said. "While there were valid claims against the contractor defendants, the force of those claims was undercut by the highway department's position that the contractors all acted according to the highway department's instructions and the contractors were not permitted to do anything differently."

He stressed that highway department personnel physically removed the flashing overhead intersection beacon. The department also received complaints about the condition of the intersection that they did not pass on to the general contractor. A number of witnesses — including employees from the Boone County fire department and a Missouri highway patrolman — testified about dangers at the intersection.

"The lay witness testimony was important to establish that the conditions were dangerous and, perhaps more importantly, that the highway department was warned about these conditions by the public," Franciskato said.

Finally, the plaintiffs claimed that highway department personnel installed an improper and misleading sign in response to complaints from the community. They presented evidence that the traditional use of an "intersection ahead" sign is to indicate to through traffic that a side road intersection is ahead rather than an intersection requiring the

driver to stop. MHTC's expert witness supported this claim by testifying that the intersection sign was "non-traditional," and that he would have chosen a "stop ahead" sign to make it clear that a stop was required.

In January, the plaintiffs reached settlements with the contractor and subcontractors — \$225,000 from Chester Bross, \$250,000 from Hardy's and \$30,000 from ATK.

Following arbitration with MHTC, the arbitrators assessed total wrongful death damages at \$2.5 million, which was offset by the \$505,000 in settlements, reducing the award to \$1,995,000. The arbitrators then allocated 65 percent fault to Robert van Driel and 35 percent fault to MHTC, resulting in a final arbitration award of \$698,250. However, the damages against MHTC were capped at \$345,499 per the sovereign immunity statute.

"The assessment of 35 percent fault to MHTC was contrary to logic and the law, or what used to be the law before the doctrines of comparative fault and products liability influenced traditional negligence theory to the extent that it is often unrecognizable," said MoDOT attorney Cartwright.

"The arbitrators found that the stop sign 'if noticed' was visible for 1,000 feet," he said. "If MHTC and other public entities are not entitled to the minimal expectation that drivers will perceive and stop for stop signs, then every intersection is arguably a dangerous condition in property."

#### Contractor liability

"In this case, it was highly likely that the majority of the fault would have been assessed to the plaintiff and MoDOT," Franciskato said. But since the case was filed before tort reform, the contractors would have been liable for MoDOT's fault in excess of the cap, up to two times their own fault — assuming their fault was less than van Driel's, or for the entire amount if their fault was equal to or greater than van Driel's.

"You can confirm this with the defense counsel for the contractors," he said, "but I suspect they would have never offered \$505,000 to settle without the risk of joint and several liability."

Robbye Hill Toft of St. Louis, attorney for subcontractor ATK, quickly confirmed that suspicion.

"The only reason ATK offered any money toward settlement was its fear of exposure to joint and several liability with MHTC," Toft said. "We felt gross damages were significant, and while plaintiff had comparative fault, a company as small as ATK could not run the risk of becoming liable for all damages over \$300,000 assessed against MHTC."

Joint and several liability for a company such as ATK "is a huge threat when its co-defendant often has its liability capped by statute," she said. "We knew we were exposed to joint and several liability once our motion for summary judgment was denied. We were headed to trial. Avoidance of uncontrolled exposure was the driving force in our decision to contribute toward settlement."

Tort reform eliminated pure joint and several liability — now requiring a defendant to be 51 percent at fault to be jointly and severally liable.

"Knowing the facts that we learned in discovery, we might never have filed the case against the contractors under the new law," Franciskato said. "However, unless you are able to learn the facts related to who's at fault prior to filing, you probably would still include the contractors in the lawsuit."

Toft added, "In an action tried since tort reform, we would have been comfortable taking the van Driel case to trial."

#### Arbitration

"The statute allows plaintiffs the ability to gain the potential benefits of arbitration — shorter and more informal proceeding and the ability to avoid an aberrational result — without giving anything up since collection of a large damage award is not possible because of the statutory cap," Franciskato said.

Noting that most cases against the Department of Transportation involving a dangerous road condition are going to face issues of comparative fault, Franciskato considers arbitration a good strategic option.

"Having a panel of three arbitrators who appreciate the concept of comparative fault permits the plaintiff to avoid a possible jury reaction that puts all of the blame on the driver," he said. "This is an attractive trade-off given that the damage cap on a recovery against the DOT does not permit a 'home run' recovery."

On the flip side, MoDOT attorney Cartwright said this case illustrates the "absurdity" of a statute that compels one party to submit to binding arbitration at the request of another.

"Generally, arbitration assumes that there was an agreement between the parties, and MHTC would have never agreed to arbitrate this case," he said. "Since the statute was tacked onto another bill, without debate or any opportunity for MHTC to comment, it is unlikely that anyone in the general assembly understood the ramifications of it when it was passed."